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Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

MAY 12 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Amendment of Section 73.202(b))
Table of Allotments)
FM Broadcast Stations)
(Rosendale, New York))
)
)
)
)
)
)

MM Docket No. 93-17
RM-8170

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

SUPPLEMENTAL REPLY COMMENTS

Sacred Heart University, Inc. ("SHU") and Radio South Burlington, Inc. ("RSB"), jointly, by their counsel, hereby submit supplemental reply comments in response to new matters raised by The State University of New York ("WFNP") in its reply comments of April 27, 1993.^{1/} SHU and RSB separately requested leave to file this reply pleading in accordance with Section 1.415 of the Commission's Rules. The purpose of this reply pleading is to respond to a statement made by WFNP for the first time in its reply comments that WFNP does not intend to apply for Channel 273A at Rosendale at a site which complies with the Commission's minimum distance separation requirements in Section

^{1/} This pleading is submitted within 15 days of WFNP's reply comments.

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73.207. This statement raises a number of issues that SHU and RSB believe are necessary to resolve before Channel 273A can be allotted to Rosendale. In support hereof, SHU and RSB state as follows:

1. In its original petition, WFNP requested the allotment of Channel 273A and specifically proposed site restricted coordinates to meet the Commission's spacing requirements (8.6 km. south). While WFNP stated it would apply for a construction permit should the petition be granted, WFNP made no mention that it did not intend to apply at a set of coordinates which complied with the Commission's spacing rules. In response to this petition, the Commission proposed to allot Channel 273A to

3. When SHU and RSB raised an issue in its "Joint Counterproposal" that the use of Channel 273A at Rosendale at the set of coordinates offered by WFNP would not provide coverage to as many listeners as WFNP is currently able to reach with its present operation on Channel 204, only then did WFNP disclose its real intention in its reply comments at page 2, paragraph 5 --

"WFNP has requested that this allocation be made under the rules governing commercial broadcasters.... WFNP does not intend to actually construct at the allocation point, but intends to build facilities at its existing location."

WFNP's existing site will be short spaced on Channel 273A by 1.2 km to WGNV(FM), (Channel 276A), Newburgh, New York, and by 5.2 km to WNEW-FM (Channel 274B), New York, New York. See attached Engineering Statement of Communications Technologies, Inc., Table 1. Thus, WFNP is now asking the Commission to allot a substandard facility. This is a surprising revelation and one that could not have been anticipated in previous filings by SHU and RSB. As will be shown, WFNP cannot achieve a full 6 kW facility at its current site as is required under the Commission's allocation rules. Furthermore, as will be shown, this substandard facility will fail to provide an acceptable level of principal community coverage (70 dBu service) to Rosendale and will cause a substantial loss in the number of its current listeners.

4. Until now, the Commission has consistently refused to denigrate the FM band by comprising the integrity of its allocation policies to allow petitioners to achieve what is only available at the application stage. See e.g., Chester and Wedgefield, South Carolina, 4 FCC Rcd 4503 (Policy and Rules Division 1989); rev. den. 5 FCC Rcd 5572 (1990). Compliance with the Commission's spacing rules is fundamental to the Commission's scheme of allocating channels in the FM Table of Allotments. Where the Commission allocates a channel knowing that the only party expressing an interest proposes to locate at a short spaced site and affirmatively states that it does not intend to apply at a non-short spaced site, the Commission by even entertaining such a proposal would undermine the rule making process to such a degree that there would no longer exist a reason to have a two-step procedure.

5. In Amendment of Part 73 of the Commission's Rules to Permit Short Spaced FM Station Assignments by Using Directional Antennas, 4 FCC Rcd 1681 (1989), recons. 6 FCC Rcd 5356 (1991), the Commission clarified the extent to which it would allow short spaced proposals based on contour protection. The Commission stated at paragraph 13

"With respect to the impact of contour protection in our general allotment rules, we have held throughout this proceeding that no change has been made or will be made in the FM channel allotment process. All proposals for channel allotments must meet the minimum distance separations of Section 73.207 of our rules...." (Emphasis added.)

6. Here, although Channel 273A can be allotted to Rosendale consistent with Section 73.207, the Commission has no party stating it would submit an application consistent with that rule. Thus, WFNP's proposal to use a short spaced site is a prima facie violation of the Commission's rules. Under such circumstances, the Commission would be knowingly approving a short spaced allotment.^{2/} See, Chester and Wedgefield, South Carolina, supra at page 4504 ("While the Commission has stated its willingness to consider the use of directional antennas as a means of protecting short spaced facilities from objectionable interference as a factor in the station assignment process, it has clearly stated that it is unwilling to consider the proposed use of directional antennas as a factor in the allotment process.")

7. Even worse, as demonstrated in the attached Engineering Statement, if WFNP attempts to utilize Section

^{2/} Although the Commission has proposed to forego the allotment process in certain instances to allow modifications of licenses to another channel, that proposal has not yet been adopted. See Amendment of the Commission's Rules to Permit FM Channel and Class Modifications, 7 FCC Rcd 4943 (1992). Nor is it clear that such a proposal would apply to the circumstances here. The Commission has made it clear that regardless of the outcome of this pending proceeding, if a rule making is required to allot a channel, it will continue to insist that allotments be made on the basis of non-short spaced sites and provision of city-grade coverage. Here, a rule making proceeding is required to establish the existence of an alternate channel in case there was a commercial interest expressed in Channel 273A at Rosendale.

73.215 to protect the relevant contours of the short spaced stations, WFNP must lower its power to 105 watts (at its current height) omnidirectionally or employ a directional antenna. See attached Engineering Statement. If WFNP were to operate at 105 watts, WFNP's 70 dBu contour would not reach any part of Rosendale. This complete lack of city-grade coverage would render its proposal ungrantable. Even if it were to utilize a directional antenna to avoid the overlap, the best that WFNP could provide to Rosendale is a 70 dBu signal to 64% of Rosendale's population (821 persons out of 1,284 population) and to no more than 70% of the land area of Rosendale. See Engineering Statement.

8. In other cases, the Commission has consistently refused to allocate a channel where it knows the proposed site will not provide 100% city-grade coverage. See Greenwood, South Carolina, et al., 2 FCC Rcd 3583 (1987), review denied 3 FCC Rcd 4108 (1988), erratum, 3 FCC Rcd 4374 (1988). ("Commission policy is to deny allocation requests where the principal city-coverage requirement of Section 73.315(a) cannot be complied with. See e.g., Wadley and Dadeville, Alabama, 51 FR 2435 (July 3, 1986); New Boston, Ohio, 40 RR 2d 1628 (1981); and Attica, New York, 54 FCC 2d 1137 (1975).") See also, Sonora, California, 6 FCC Rcd 6042 (Alloc. Br. 1991); Virginia City, Nevada, et al., 7 FCC Rcd 1319 (Alloc. Br. 1992).

9. Furthermore, the Commission should consider that if WFNP were to reduce to 105 watts, it would incur an actual loss of service within its 60 dBu contour to nearly 100,000 persons. A directional antenna proposal would still entail an actual loss of service to nearly 30,000 current listeners. See Engineering Statement. Unfortunately, WFNP has not revealed how it plans to comply with Section 73.215. Thus, this analysis calls for some speculation. Such an analysis reinforces the difficulties placed upon the Commission at the allocation stage where it lacks a specific proposal, to evaluate the public interest benefits or detriments of a proposal relying on contour protection.^{3/}

CONCLUSION

10. By its own representation, Petitioner WFNP has requested that the Commission approve a new channel allotment for which it has no intention of complying with the Commission's allocation technical rules. WFNP proposes to apply for a short spaced site and affirmatively states that it has no intention of

^{3/} WFNP indicated in its reply pleading that if it were to operate on Channel 255A at Rosendale instead, it would need to seek a waiver of the main studio rule. Contrary to WFNP's belief, the Commission's main studio rule is routinely waived for noncommercial educational broadcasters. See Nebraska Educational Television Communications, 4 RR 2d 771 (1965); Community TV of Southern California, DA 93-354 released April 1, 1993, at Note 4, and Amendment of Sections 73.1125 and 73.1130 of the Commission Rules, the Main Studio and Program Origination Rules for Radio and Television Stations, 65 RR 2d 119, 125 (1988).


relocating to a non-short spaced site. The Commission would set a dangerous precedent and denigrate the integrity of its allocation scheme if it were to knowingly allot a channel where it has no party willing to file for a site which complies with the Commission's Rules.

11. This failure is particularly troublesome where in evaluating WFNP's current site, there exists two short spacings which would require either an overall power reduction or the employment of a directional antenna pursuant to Section 73.215 of the Commission's Rules. In either case, it appears that a significant or an entire lack of city-grade coverage would result as well as a substantial loss in service to current listeners. Neither option would be in the public interest and provide a basis for allowing further consideration of the WFNP site at the application stage. Thus, now that WFNP has revealed its real intention, though not the details of its proposal, the Commission must find that the original WFNP proposal is not acceptable for consideration and cannot at this late stage be amended to come into compliance with the Commission's allocation rules.

Accordingly, based on the record before it, the Commission should deny WFNP's proposal to allot Channel 273A to Rosendale as unacceptable ab initio.

Respectfully submitted,

SACRED HEART UNIVERSITY, INC.
RADIO SOUTH BURLINGTON, INC.

By: 
Mark N. Lipp

Mullin, Rhyne, Emmons and Topel, P.C.
1000 Connecticut Avenue, #500
Washington, D.C. 20036
(202) 659-4700

Their Counsel

May 12, 1993

JOINT SUPPLEMENTAL REPLY COMMENTS
AMENDMENT OF SECTION 73.202(b)
TABLE OF ALLOTMENTS
FM BROADCAST STATIONS
ROSENDALE, NEW YORK
MM DOCKET NO. 93-17, RM-8170

MAY 1993

JOINT SUPPLEMENTAL REPLY COMMENTS
AMENDMENT OF SECTION 73.202(b)
TABLE OF ALLOTMENTS
FM BROADCAST STATIONS
ROSENDALE, NEW YORK
MM DOCKET NO. 93-17, RM-8170

MAY 1993

SUMMARY

The following statement has been prepared jointly on behalf of **Sacred Heart University, Inc.** ("SHU") and **Radio South Burlington, Inc. ("RSB")** in response to Reply Comments filed by the State University of New York ("WFNP") in MM Docket No. 93-17. WFNP is the petitioner in this proceeding and revealed information in its Reply Comments which was previously undisclosed and is contradictory to standard Allocations Branch Policy and Procedure.

WFNP PLANS TO USE A SHORT-SPACED SITE

In paragraph 5 of its Reply Comments, WFNP states,

"WFNP does not intend to actually construct at the allocation point, but intends to build facilities at its existing location."

The licensed WFNP site does not meet *Section 73.207* allocation standards for Channel 273A.

The site is short-spaced to two existing facilities, as tabulated below:

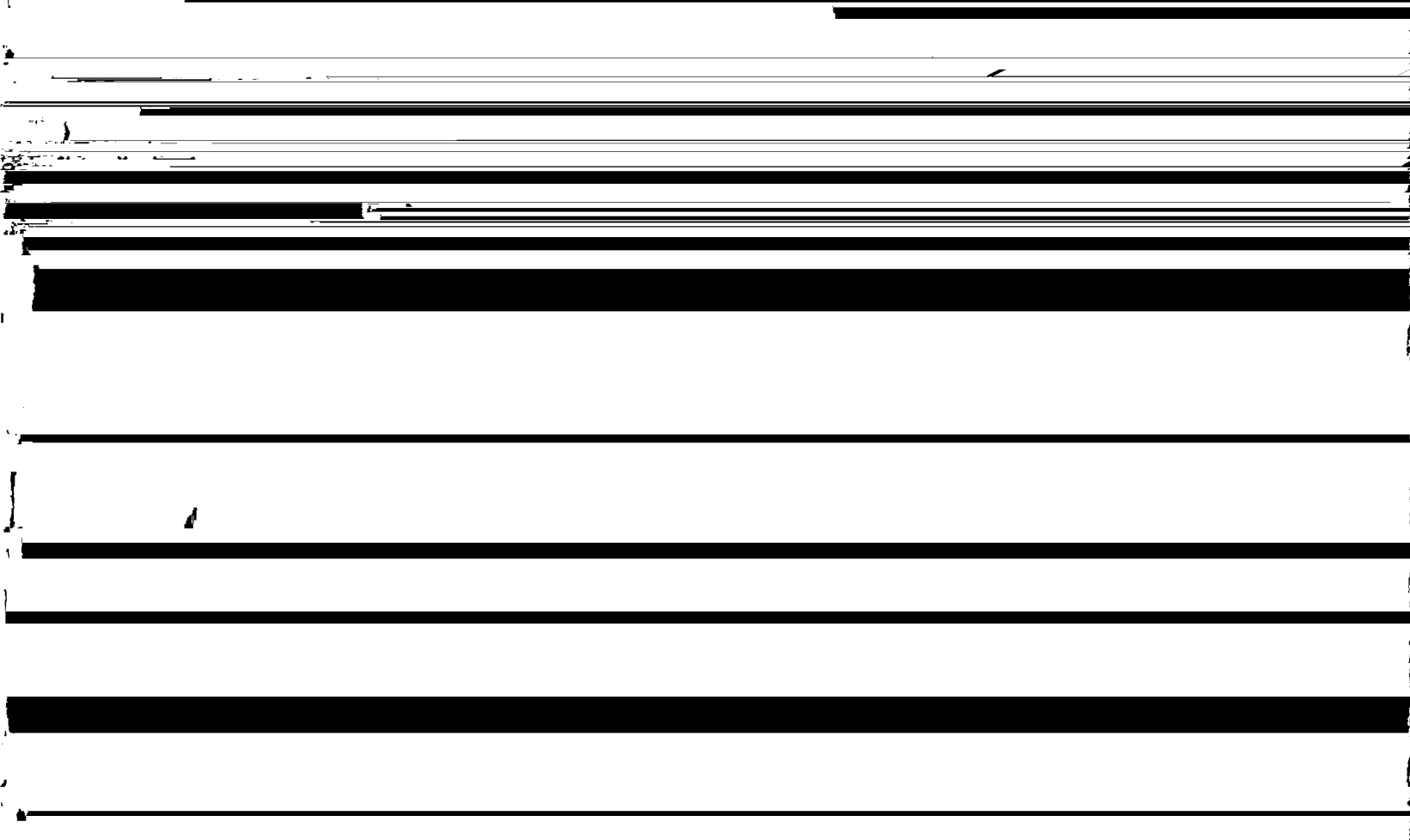
<u>Call</u>	<u>City/State</u>	<u>Channel</u>	<u>Dist. km</u>	
			<u>Required</u>	<u>Actual</u>
WNEW	New York, NY	274B	113	107.8
WGNY	Newburgh, NY	276A	31	29.8

The licensed WFNP site is located 11.8 kilometers from the allocation coordinates proposed by WFNP for Channel 273A at Rosendale, New York, see Table I attached.

WFNP SECTION 73.215 FACILITIES

If WFPN wishes to utilize its licensed site for Channel 273A, it must comply with the contour clearance procedures described in *Section 73.215* of the Commission's Rules and Regulations. *Figure 1*, attached, is an allocation map showing the WFPN contour locations based on full 6 kW equivalent facilities, 0.37 kW at 393 m HAAT. These facilities would cause massive, prohibited, overlap of the proposed Channel 273A, 48 dBu F(50,10) contour to the WNEW-FM Channel 274B, 54 dBu F(50,50) service contour. Any contour overlap would violate *Section 73.215* of the Rules and render an Application for Construction Permit unacceptable.

To meet *Section 73.215* requirements from the licensed site, WFPN would need to do one of two things:



The 70 dBu contour covers 70% of the area of the Village of Rosendale and 821 persons (64%) of the 1,284 persons in that community.

Lastly, a Channel 273A operation at the licensed WFNP site would not be in the public interest. Figure 2 demonstrates that the 60 dBu contour for the Channel 273A directional facility will result in a loss of existing service south of the WFNP site when compared to the licensed WFNP facility. A total of 29,883 persons reside in the loss area.

WFNP 105 WATT ND CHANNEL 273A OPERATION

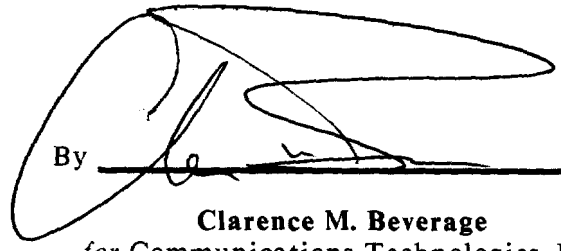
As mentioned earlier, WFNP could meet *Section 73.215* contour clearance requirements by proposing to reduce power to 105 watts with a non-directional antenna at the licensed site. However, this mode of operation would cause the 70 dBu contour to fall short of Rosendale, New York to the extent that none of the community would be reached by the 70 dBu contour, a clear violation of *Section 73.215(a)* of the Rules.

Figure 2 shows the 60 dBu contour for the 105 watt omni-directional operation. The licensed WFNP facility serves 320, 268 persons within its 60 dBu contour. The 105 watt omni-directional facility would serve 220,875 persons which would result in a loss of existing service to 99,393 persons.

CONCLUSION

In Reply Comments, WFNP has revealed that it plans to build a Channel 273 facility at its current licensed site. This site is short-spaced under *Section 73.207*, fails to provide the required 70 dBu service to the county of Rosendale, New York, and would result in a loss of service to people now receiving service from WFNP.

The foregoing was prepared by Clarence M. Beverage of *Communications Technologies, Inc.*, Marlton, New Jersey, whose qualifications are a matter of record with the Federal Communications Commission. The statements herein are true and correct of his own knowledge, except such statements made on information and belief, and as to these statements he believes them to be true and correct.

By  _____
Clarence M. Beverage
for *Communications Technologies, Inc.*
Marlton, New Jersey

SUBSCRIBED AND SWORN TO before me

this 11 th day of May, 1993

Esther G. Sperbeck, NOTARY PUBLIC

**ESTHER G. SPERBECK
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES OCT 15, 1997**



TABLE I

ALLOCATION STUDY CHANNEL 273A (FROM WFNP LICENSED SITE)

ROSENDALE, NEW YORK

MAY 1993

Search of channel 273A+ (102.5 MHz), at N. 41 43 9, W. 73 59 47.

Searching Channel 273A+ (102.5 MHz), from the site of WFNP:

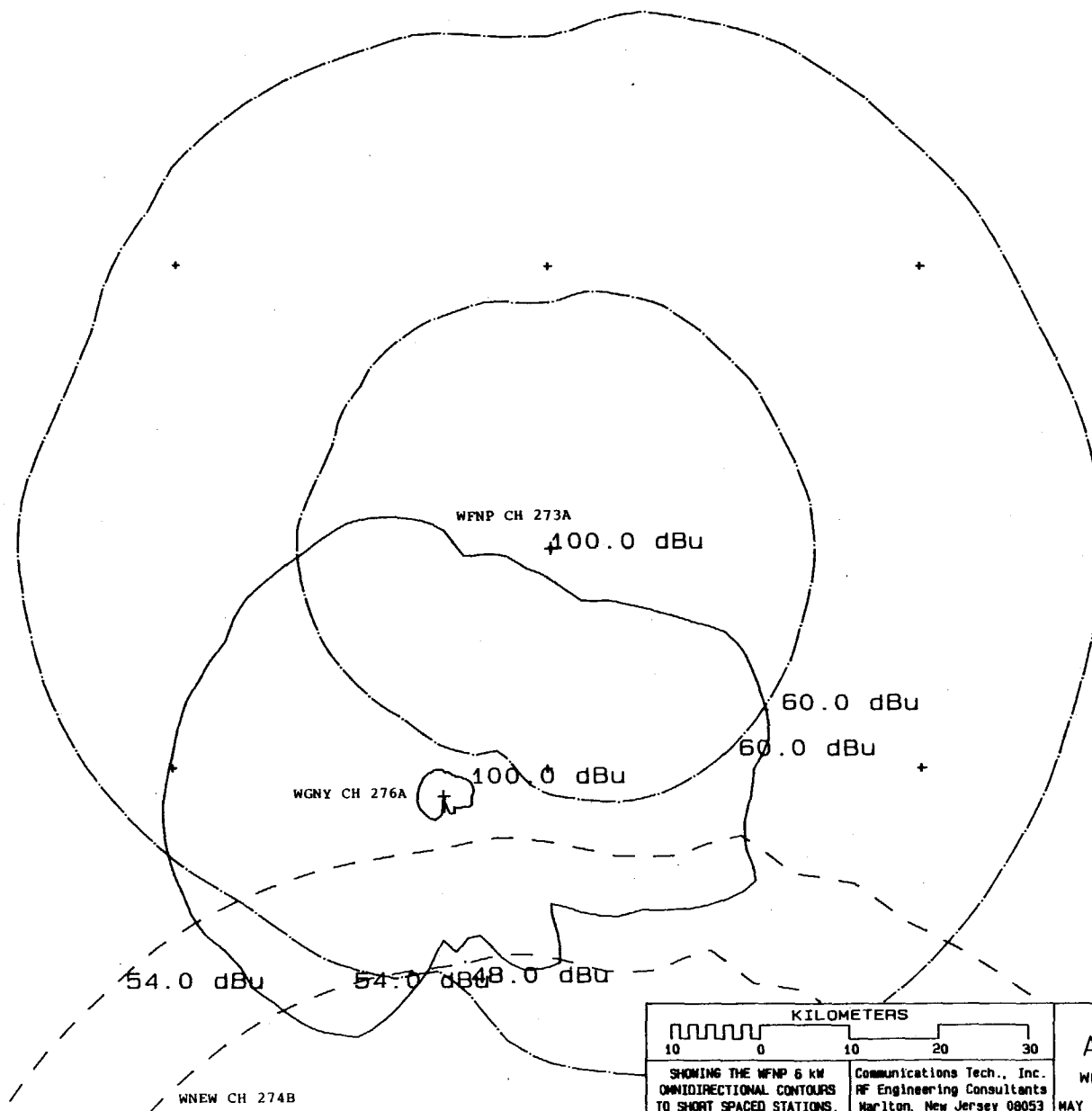
CALL	CITY	ST	CHN	CL	S	DIST	SEPN	BRNG	CLEARANCE
WOSR	Middletown	NY	219	B1	L	48.3	12.0	254.3°	36.3
W219AQ	Hurley, etc.	NY	219	D	L	19.6	0.0	1.0°	19.6
WFRH	Kingston	NY	219	A	C	29.8	10.0	356.2°	19.8
WFRH	Kingston	NY	219	A	A	29.8	10.0	356.2°	19.8
WQCD	New York	NY	270	B	C	107.8	69.0	179.5°	38.8
ALC	Liberty	NY	271	A	A	69.0	31.0	275.7°	38.0
W272AF	Rhinebeck, etc.	NY	272	D	L	24.2	0.0	22.3°	24.2
ALC	Franklin	NJ	272	A	U	78.4	72.0	215.4°	6.4
WSUS	Franklin	NJ	272	A	L	78.4	72.0	215.4°	6.4
WFNP	Rosendale	NY	273	A	A	11.8	115.0	343.3°	-103.2
WUUU	Rome	NY	273	B	L	188.8	178.0	320.8°	10.8
ALC	Rome	NY	273	B	U	188.8	178.0	320.8°	10.8
ALC	New York	NY	274	B	U	107.8	113.0	179.5°	-5.2
WNEW	New York	NY	274	B	L	107.8	113.0	179.5°	-5.2
WNEW	New York	NY	274	B	C	107.8	113.0	179.5°	-5.2
ALC	Hartford	CT	275	B	U	97.5	69.0	100.3°	28.5
WDRCFM	Hartford	CT	275	B	L	97.5	69.0	100.3°	28.5
ALC	Newburgh	NY	276	A	U	29.8	31.0	203.6°	-1.2
WGNYS	Newburgh	NY	276	A	L	29.8	31.0	203.6°	-1.2

N 42 0 0
W 75 0 0

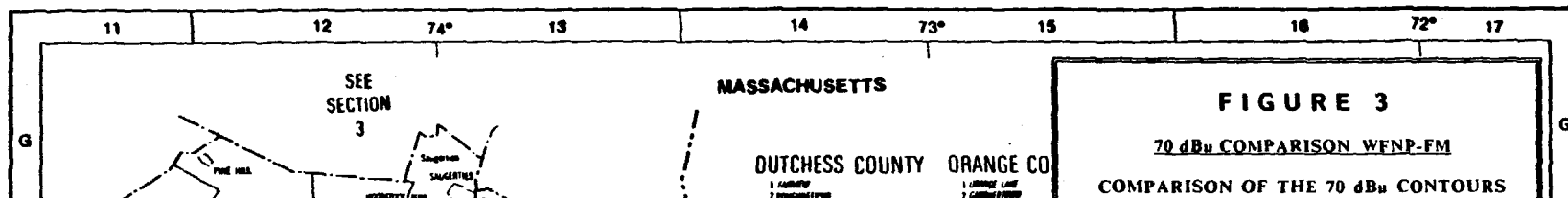
N 42 0 0
W 73 0 0

N 41 30 0
W 75 0 0

N 41 30 0
W 73 0 0



NUMBER OF INHAB



Counties, C

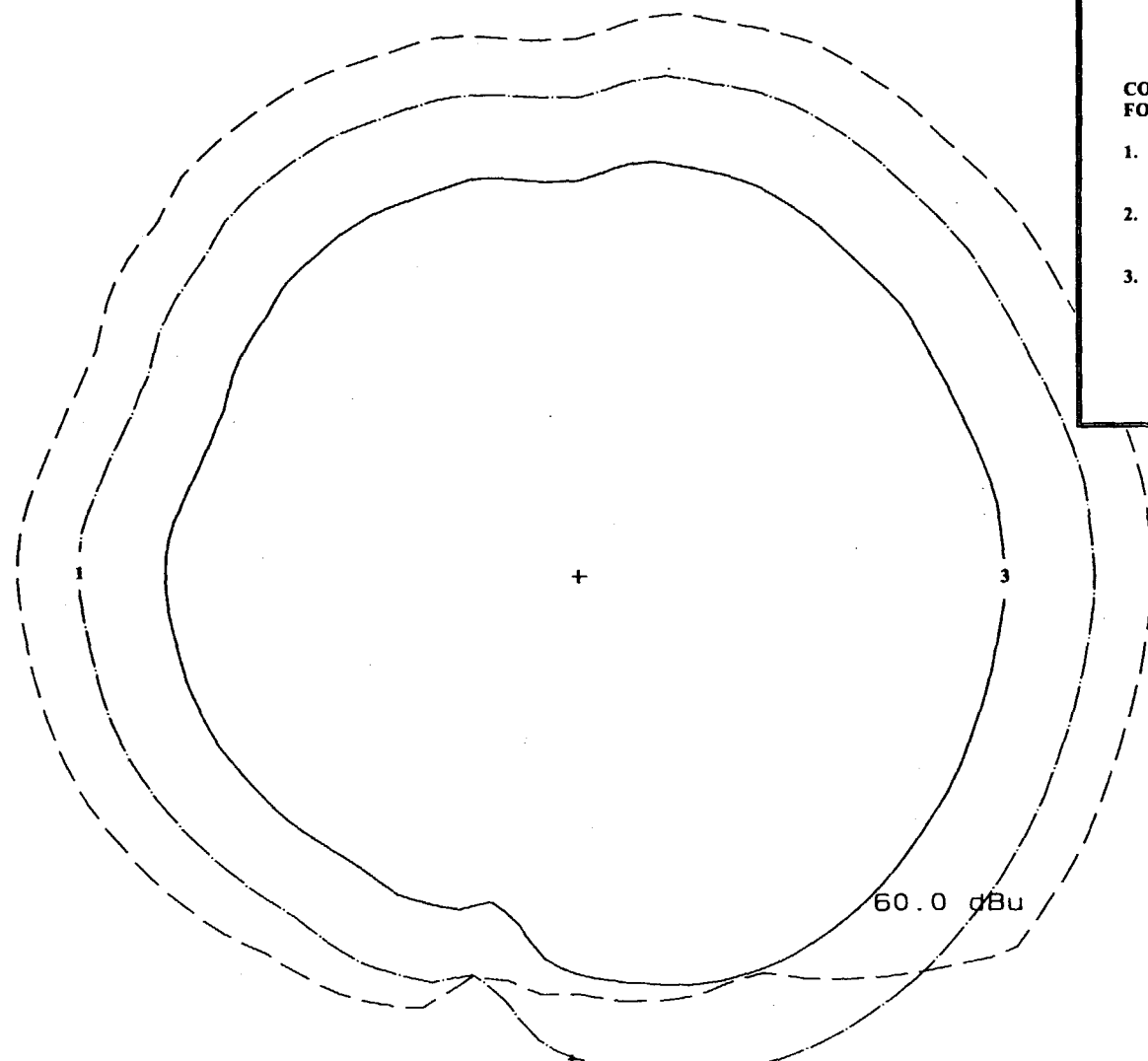


FIGURE 2

COVERAGE COMPARISON WFPN-FM

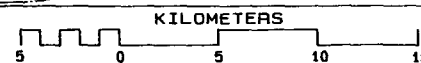
**COMPARISON OF THE 60 dBu CONTOURS
FOR WFPN:**

1. LICENSED CH 204A, 0.23 kW AND 393 m HAAT.
2. CH 273A, 0.37 kW MAX. DA AND 393 m HAAT.
3. CH 273A, 0.105 kW ND and 393 m HAAT.

Communications Technologies, Inc.
Marlton, New Jersey
May 1993

+N 41 30 0
+W 74 30 0

+Transverse Mercator



See label at right for
contour descriptions.

Communications Tech., Inc.
RF Engineering Consultants
Marlton, New Jersey 08053

60 dBu COVERAGE

WFPN CH 273A FROM CH 204A SITE

MAY 1993

FIGURE 2

CERTIFICATE OF SERVICE

I. Veronica Abarre, a secretary in the law firm of Mullin.

Allan G. Moskowitz, Esq.
Kaye, Scholer, Fierman,
Hays & Handler
901 15th Street, N.W.
Suite 1100
Washington, D.C. 20005
(Counsel to Bambi Broadcasting, Inc.)

Raymond A. Natole
P.O. Box 327
Shokan, NY 12481


Veronica Abarre